IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC07-95
L.T. CASE NO. 4D06-1039

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STATE OF FLORIDA,

Petitioner,

v.

GLENN KELLY,

Respondent.

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# PETITIONER'S INITIAL BRIEF ON THE MERITS

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ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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## PRELIMINARY STATEMENT

Petitioner, THE STATE OF FLORIDA, was the prosecution and Respondent, GLENN KELLY, was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this honorable Court except that Petitioner may also be referred to as the State.

The record on appeal consists of two volumes, the record (R) and the transcript of proceedings (T) which will be referenced accordingly, followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

On April 26, 2004 the State filed an information charging Respondent with Felony DUI (C.O.C.). (R. 4-5) On October 20, 2005 Respondent filed a motion to dismiss for lack of jurisdiction arguing that the State may not use an uncounseled misdemeanor conviction to enhance a later crime to a felony except under certain well-defined circumstances. (R. 152-157) The State filed a motion to strike or request for an evidentiary hearing, as a response to the motion to dismiss. (R. 159-179).

On February 24, 2006 an evidentiary hearing was held. Respondent argued as follows:

> Frank Maister on behalf of Glenn Kelly. We are here on a felony DUI information. The State's relying on three priors, three prior DUI's. They are relying on one in '87, '95 and '97, and then the incident arrest in 2003. We are, contrary to what I just said, we are challenging the validity of the '95 and '97 pleas to DUI and those convictions on the grounds that they are pleas that were taken at arraignment, uncounseled while the defendant was indigent. Counsel was not appointed and he did not validly waive his right to counsel.

(T. 3).

The State argued that the defense was precluded from making the dismissal argument based upon the doctrine of laches. The State argued that because of Respondent's lack of due diligence in bringing the motion the State was prejudiced by the lack of records. (R. 159, T. 7-8). On the merits,

the State argued that copies of the three prior convictions indicates that in all three cases Respondent filled out a plea form which explained the right to an attorney which was waived by Respondent when he signed the plea form. (T. 14). The State further contended that a defendant can plea a case uncounseled if he is informed that he has a right to counsel and waives that right. (T. 15)

At the hearing, Respondent testified that he plead to the '95 case at arraignment. (T. 20-21) Respondent testified that in '95 he was informed of his right to an attorney and he stated he could not afford one. (T. 22) Respondent did not recall if the judge asked him if he wanted an attorney. (T. 22) Respondent knew he had a right to an attorney, but he waived that right. (T. 24) Respondent acknowledged that he only received probation and community service for the '95 case. (T. 22) Additionally, Respondent agreed that he knew he had a right to an attorney in the '97 case in which he took a plea. (T. 27) Again, Respondent testified he was not incarcerated as a result of the '97 case. (T. 26) Respondent also testified that he knew he had a right to an attorney at the '87 plea and he waived that right. (T. 28) The records of the 1987 case indicate that Respondent served probation and performed community service. ( See front portion of Record on Appeal )

On February 24, 2006 the trial court entered a written order granting the Motion to Dismiss. (R. 181) The State appealed.

On appeal, the Fourth District Court of Appeal affirmed the trial court's order granting Respondent's motion to dismiss.

The Fourth District relied on the case of *Hlad v. State*, 585 So. 2d 928 (Fla. 1992). The district court recognized that its application of *Hlad* was based upon *Baldasar v. Illinois*, 446 U.S. 222 (1980) which has since been overruled by the subsequent United States Supreme Court decision in *Nichols v. United States*, 511 U.S. 738 (1994). *Nichols* held that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction in enhancing a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment. Accordingly, the Fourth District Court certified the following question to this Court:

> *Can an uncounseled prior misdemeanor conviction, in which the defendant could have been incarcerated for more than six months, but was not incarcerated for any period, be used to enhance a current charge from a misdemeanor to a felony?*

*State v. Kelly*, 946 So. 2d 1152 (Fla. 4th DCA 2006)

## SUMMARY OF THE ARGUMENT

The certified question must be answered in the affirmative. The United States Supreme Court's decision in *Nichols v. United States*, expressly overruled *Baldasar v. Illinois*, upon which this Court relied in *Hlad v. State*. Although Florida can grant greater protections under its Constitution than the United States does under the Sixth Amendment, Respondent asks this Court to recognize the trend wherein other states have followed *Nichols* and a need to not disallow a predicate conviction for which there was no right to counsel on the ground that the conviction was uncounseled, as well as recognizing the need to uphold recidivism statutes.

## ARGUMENT

THE QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL MUST BE ANSWERED IN THE AFFIRMATIVE. UNDER PREVAILING UNITED STATES SUPREME COURT LAW AN UNCOUNSELED PRIOR MISDEMEANOR CONVICTION, IN WHICH THE DEFENDANT COULD HAVE BEEN INCARCERATED FOR MORE THAN SIX MONTHS, BUT WAS NOT INCARCERATED FOR ANY PERIOD, CAN BE USED TO ENHANCE A CURRENT CHARGE FROM A MISDEMEANOR TO A FELONY

In *State v. Kelly*, 946 So. 2d 1152 (Fla. 4th DCA 2006), the Fourth District Court stated,

> After the Florida Supreme Court decided *Hlad*, the United States Supreme Court overruled *Baldasar* and clarified that it was only actual imprisonment which would preclude a prior uncounseled misdemeanor conviction from being used to enhance. *Nichols v. United States*, 511 U.S. 738 (1994). The *Nichols* Court, in footnote 12, left the states free to guarantee a right to counsel for indigent defendants charged with misdemeanors where there is no prison term imposed, if imprisonment is a possibility. The trial court in this case accordingly correctly followed *Hlad*.

In *Hlad*,[1] this Court interpreted Justice Blackmun's concurring opinion in *Baldasar* as supporting a holding by the majority of the Supreme Court that an uncounseled conviction could not be used to reclassify a subsequent offense or enhance a subsequent sentence if the prior crime was punishable by more than six months' imprisonment or the defendant was actually

[1] *Hlad v. State*, 585 So. 2d 928 (Fla. 1991).

subjected to a term of imprisonment. *Hlad*, at 930. In other words, the uncounseled conviction could be used for these purposes if it was for a crime punishable by less than six months' imprisonment and the defendant was not actually imprisoned.

Both in *Hlad* and the instant case, the prior convictions consisted of uncounseled DUI misdemeanors. The only distinction is that in this case, Mr. Kelly's two prior DUI misdemeanor convictions were subject to a possible incarceration of *more* than six months. Under § 316.193, *Fla. Stat.* Mr. Kelly's 1995 conviction for DUI, being his second conviction, was punishable by not more than 9 months imprisonment. *See* § 316.193(2)(a)2.b., *Fla. Stat.* And, Mr. Kelly's 1997 DUI conviction was his third and punishable by not more than 12 months. *See* § 316.193(2)(b)2., *Fla. Stat.* (R. 153)[2] [3]

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[2] The documents on the prior convictions are located in the front of the Record on Appeal, however, they are not numbered or otherwise identified.

[3] In its opinion, at footnote 1, the Fourth District Court reaches a conclusion that is not supported by the record. At the evidentiary hearing, the state provided plea forms for the '95 and '97 convictions wherein Respondent waived his right to counsel. Petitioner submits the trial court, in granting the motion to dismiss, and although silent in its order, did so based on Respondent's argument that because he was facing more than six months imprisonment, he had a right to counsel. (T. 40, R. 153-154) Respondent vehemently disagrees with the Fourth District Court's assumption that the trial court "obviously resolved the waiver issue against the state." *State v. Kelly*, 946 So. 2d 1152, 1154 n. 1 (Fla. 4th DCA 2006).

In *Baldasar v. Illinois*, 446 U.S. 222 (1980), a split Court decided to limit the efficacy of uncounseled misdemeanor convictions of indigent defendants. *Baldasar* consisted of a *per curiam* opinion that provided no rationale, but merely referred to the "reasons stated in the concurring opinions", three separate concurring opinions, and a dissent. The result was the reversal of a felony conviction which utilized the prior uncounseled misdemeanor conviction of an indigent, with the reasoning that the prior conviction "was not valid for all purposes." *Id.* at 226. Justice Blackmun cast the deciding vote in a concurrence to prohibit use of the prior conviction in enhancing the defendant's sentence.

However, as noted by this Court in *Hlad*,

> Under Justice Blackmun's bright line rule, Hlad's prior DUI conviction would have been valid for enhancement because he did not receive imprisonment nor could he have been imprisoned for more than six months as a result of the uncounseled conviction. This rationale is well articulated by Professor David S. Rudstein in a law review article in which he stated:
>
> > Baldasar should not be read, however, to preclude the subsequent use of a prior uncounseled misdemeanor conviction under an enhanced penalty provision when the previous offense was punishable by imprisonment for six months or less and the conviction did not actually result in the defendant's imprisonment. The opinions of Justices Marshall and Stewart would clearly preclude the subsequent enhancement use of any prior uncounseled misdemeanor conviction. These

> opinions focused only on the increased imprisonment for the subsequent offense without any mention of the authorized punishment for the prior offense. It is equally clear the four dissenters would allow such a conviction to be used for enhancement purposes if, as in Baldasar, the prior conviction was constitutional under *Argersinger* and *Scott.*
>
> The deciding opinion, therefore, would be that of Justice Blackmun. Although he did not expressly deal with this situation in *Baldasar*, it is fair to infer from Justice Blackmun's emphasis on the invalidity of Baldasar's previous conviction under his bright-line test that he would allow a prior uncounseled misdemeanor conviction that was constitutionally valid to be subsequently used under an enhanced penalty provision. Additionally, in Justice Blackmun's view, a misdemeanor conviction for an offense punishable by not more than six months imprisonment that does not actually result in the defendant's imprisonment is constitutionally valid, even though uncounseled. It therefore follows he would join with the four *Baldasar* dissenters and allow its subsequent use for sentence enhancement purposes.

*Hlad*, 585 So.2d at 930, *citing* David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar,* 34 U. Fla. L. Rev. 517, 534-35 (1982) (footnotes omitted).

It is noteworthy that the majority opinions in *Baldasar* were comprised entirely of those dissenting in *Scott* and the next case to take up the issue, *Nichols v. U.S.*, 511 U.S. 738 (1994) which will be discussed below. As a result of the lack of unanimity amongst the majority, federal

courts have based subsequent decisions on opinions other than *Baldasar*. State courts have done much the same.

Writing for the *Baldasar* dissent, Justice Powell criticized the majority's holding stating "[a] constitutionally valid conviction is now constitutionally invalid if relied upon as the predicate for enhancing the sentence of a recidivist. In my view, this result is logically indefensible." *Id.* at 231. Justice Powell went on to point out that it is the subsequent criminal act that exposes a defendant to an increased penalty for the second crime rather than alter or enlarge a prior sentence. *Id*. at 232. He further reasoned that this conflicted with the Court's consistent opinion that repeat-offender laws penalized only the last offense committed by the defendant. *Id*. (citing *Moore v. Missouri*, 159 U.S. 673, 677 (1895); *Oyler v. Boles*, 638 Us. 448, 451 (1962)).

Subsequently, in *Nichols v. United States*, 511 U.S. 738, 746-748 (1994), the Supreme Court recognized that "[t]he degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision." *Id*. at 746. It was through *Nichols*, that the Court renewed its adherence to *Scott* and adopted the rationale revealed in Justice Powell's dissent in *Baldasar*,

> We adhere to that holding today, but agree with the dissent in *Baldasar* that a logical consequence of the holding is that an

> uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in *Baldasar*, "this Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant. E. g., Moore v. Missouri, 159 U.S. 673, 677, [40 L. Ed. 301, 16 S. Ct. 179, 181, 40 L.Ed. 301] (1895); Oyler v. Boles, 368 U.S. 448, 451, [82 S.Ct. 501, 503, 7 L.Ed.2d 446] (1962)." 446 U.S., at 232, 100 S.Ct., at 1590.

*Id*. at 747-748. The *Nichols* Court ultimately held:

> Today we adhere to *Scott v. Illinois*, *supra*, and overrule *Baldasar*. Accordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.

*Id*. at 748-749.(emphasis supplied).

Accordingly, it now appears that the Fourth District Court is asking this Court to decide whether it intends to follow *Nichols*. The State contends that *Hlad* is consistent with *Nichols* in all respects except for the potential period of incarceration a defendant could receive on the prior misdemeanor DUI convictions, *i.e.* more than six months.

Petitioner would point out that since *Nichols* the trend has been for other states to fall into "lock-step" with *Nichols: See State v. Delacruz*, 899

P.2d 1042 (Kan. 1995); *State v. Cook*, 706 A.2d 603 (Me. 1998); *State v. Reichenbach*, 587 N.W.2d 1 (Mich. 1998); *Ghoston v. State*, 645 So. 2d 936 (Miss. 1994); *State v. Pike*, 162 S.W.3d 464 (Mo. 2005); *State v. Rockburn*, 2003 Ohio 3537 (Ohio 2003); *State v. Stewart*, 892 P.2d 1013 (Or. 1995); *State v. Sosbee*, 637 S.E.2d 571 (S.C. App. 2006); *Griswold v. Commonwealth*, 472 S.E.2d 789 (Va. 1996); *State v. Hopkins*, 453 S.E.2d 317 (W.Va.1994); *State v. Schoenick*, 532 N.W.2d 470 (Wis. 1995).

This Court has clarified its holdings and receded from previous decisions in accordance with United States Supreme Court precedent. In *Owen v. State*, 696 So. 2d 715 (Fla. 1997), in light of *Davis v. United States*, 512 U.S. 452, 129 L.Ed.2d 362, 114 S. Ct. 2350 (1994), this Court recognized that Florida's Constitution does not place greater restrictions on law enforcement than those mandated under federal law when a suspect makes an unequivocal statement regarding the right to remain silent. Further expounding on that previous decision, in the later 2003 *Owen* opinion, this Court stated,

> In our original decision concerning the first direct appeal, we reversed Owen's conviction based upon the law enforcement officers' failure to stop questioning Owen after he provided the ambiguous responses. *See Owen*, 560 So. 2d at 211. There, we held that the continued questioning violated Owen's *Miranda* right to terminate questioning. *See id*. Notably, however, we determined, "The responses were, at the least, an equivocal invocation . . . ." *Id.* Subsequently, following the United States

> Supreme Court's decision in *Davis v. United States*, 512 U.S. 452, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994), we receded from our 1990 opinion, and in 1997, held that in Florida, law enforcement officers have no duty to terminate questioning, or limit themselves to asking only clarifying questions, when a suspect makes an equivocal invocation of a *Miranda* right. *See Owen*, 696 So. 2d at 719.

*Owen v. State*, 862 So. 2d 687, 697 (Fla. 2003)

Additionally, in the original *Owen*, this Court acknowledged how other states were dealing with the same issue,

> Our decision today is in harmony with those of other states which have also held in the wake of *Davis* that police are no longer required to clarify equivocal requests for the rights accorded by *Miranda*. *E.g., People v. Crittenden*, 9 Cal. 4th 83, 885 P.2d 887, 912-13 (Cal. 1994), *cert. denied*, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995); *State v. Morris*, 255 Kan. 964, 880 P.2d 1244, 1253 (Kan. 1994); *State v. Williams*, 535 N.W.2d 277, 285 (Minn. 1995); *State v. Panetti*, 891 S.W.2d 281, 284 (Tex. Ct. App. 1994) (noting that *Davis* removed federal foundation for rule that ambiguous request for counsel bars further questioning except for clarifying the statement; irrespective of primacy doctrine, no reason to mandate rule as a matter of state law and create greater rights for criminal defendants); *State v. Long*, 190 Wis. 2d 387, 526 N.W.2d 826, 830 (Wis. Ct. App. 1994), *review dismissed*, 531 N.W.2d 330 (Wis. 1995). *But see State v. Hoey*, 77 Haw. 17, 881 P.2d 504, 523 (Haw. 1994).

*Id*. at 720.

More recently, in *Galindez v. State*, 32 Fla. L. Weekly S 89 (Fla. 2007), this Court followed the Supreme Court's holding in *Washington v. Recuenco*, 126 S. Ct. 2546, 2549, 165 L. Ed. 2d 466 (2006), and agreed that

an *Apprendi/Blakely* error can be harmless. "[T]o the extent some of our pre-*Apprendi* decisions may suggest that the failure to submit factual issues to the jury is not subject to harmless error analysis, *Recuenco* has superseded them. *Id.*

Finally, as discussed by Andrea E. Joseph, in *What Goes Around Comes Around--Nichols v. United States: Validating the Collateral Use of Uncounseled Misdemeanor Convictions for the Purpose of Sentence Enhancement*, 23 Pepp. L. Rev. 965 (April 1996), *Nichols* also represents another step in the criminal justice system's current trend of intolerance for recidivism. Many states have enacted mandatory sentencing laws that significantly enhance the punishment for recidivist behavior. *Id*. at 1000. *Nichols* reaches one step further by expanding the class of recidivists who receive enhanced sentences to include misdemeanants. *Id.* at 1001.

Historically, this Court has not hesitated in upholding recidivism statutes. *See e.g. Eutsey v. State*, 383 So. 2d 219, 222-23 (Fla. 1980) (upholding the habitual offender act upon the defendant's argument that the act did not afford him the same rights as an accused person in the guilt portion of a criminal trial); *Warren v. State*, 609 So. 2d 1300 (Fla. 1992) (holding that the HVFO statute was constitutional upon challenges that the act was inequitable, subject to arbitrary and capricious application, and

violated double); *Chambers v. State*, 752 So. 2d 64, (Fla. 1st DCA 2000), affirmed by 789 So. 2d 339, (Fla. 2001)(PRR Punishment Act, 775.082(9), *Fla. Stat.* does not violate the single subject requirement of the Florida Constitution, does not violate the separation of powers doctrine, does not violate the cruel and unusual punishment prohibition, is not unconstitutionally vague, does not violate equal protection principles, and does not violate *ex post facto* principles.)

In sum, this Court has yet to comprehensively revisit this issue since *Nichols* overturned *Baldasar* in 1994.[4] Given that *Nichols* expressly reversed *Baldasar*, and *Hlad* seems entirely rooted therein, trial courts are faced with a dilemma as to which precedent they are obliged to follow. *See e.g. Kelly*. Accordingly, this Court must answer the certified question in the affirmative.

## CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, the decision of the Fourth District Court of Appeal should be QUASHED and the certified question answered in the affirmative.

[4] It appears this Court has been offered at least one opportunity to do so, but declined. *See Kirby v. State*, 765 So. 2d 723 (Fla. 1st DCA 1999), *rev. granted* February 11, 2000, *rev. denied* June 21, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Frank Maister, Esquire, 315 SE 7th Street, Suite 302 Fort Lauderdale, Fl 33301 this ____ day of _____, 2007.

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## CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

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MONIQUE E. L'ITALIEN